

GEORGE R. ARIYOSHI
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF HEALTH
P.O. Box 3378
HONOLULU, HAWAII 96801

JAN 25 1979

Mr. Paul DeFalco
Regional Administrator
U.S. Environmental Protection Agency
Region IX
215 Fremont Street
San Francisco, CA 94105

Dear Mr. DeFalco:

Subject: Request for Transfer of Authority over
Federal Facilities to the State of Hawaii

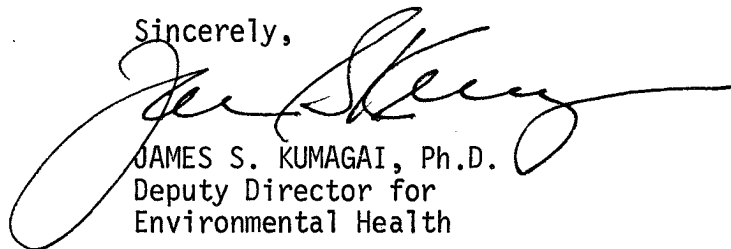
We are formally requesting a transfer of authority over Federal facilities in the State of Hawaii in accordance with Section 313 of the 1977 Clean Water Act.

Attached is our Attorney General's statement, dated June 22, 1978 on the subject matter. For your information, we intend to adopt effective federal facilities' permit by regulation. Amendments to State Public Health Regulation, Chapter 37, Water Pollution Control will be necessary to accomplish the takeover.

Timetable for final take-over will depend on your actions to re-issue three permits: Kaneohe Marine Corps Air Station, U.S. Navy Barber's Point, and U.S. Navy Iroquios Point. We would also want to know more details on the Fort Kam - Tri Services permit before finalizing the schedule for assuming full authority over the federal permits.

Should you have any need to discuss this matter further, please feel free to contact this office.

Sincerely,



JAMES S. KUMAGAI, Ph.D.
Deputy Director for
Environmental Health

DRL:skk
Attachment
cc: OEQC (w/o attach.)
Larry Lau, DAG (w/o attach.)

119 E 4
cc: ES (dpm)
cc: E

GEORGE A. L. YUEN
DIRECTOR OF HEALTH
~~Vernon C. Maile, M.D.~~
~~Audrey W. Maile, M.D., M.P.H.~~
Deputy Director of Health

James S. Kumagai, Ph.D., P.E.
Deputy Director of Health

Henry N. Thompson, M.A.
Deputy Director of Health

Tadao Beppu
Deputy Director of Health

In reply, please refer to:
File: EPHSD-PTR

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

LKL/scn



CABLE ADDRESS:
ATTGEN

RONALD Y. AMEMIYA
ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
STATE CAPITOL
4TH FLOOR
HONOLULU, HAWAII 96813

June 22, 1978

MEMORANDUM

TO: Dr. James Kumagai
Deputy Director of Environmental
Protection

ATTEN-
TION: Mr. Ralph Yukumoto
Chief, Pollution Technical
Review Branch

FROM: Laurence K. Lau
Deputy Attorney General

SUBJECT: State Regulation of Water Pollution from
Federal Facilities

By your communication dated April 12, 1978,
I understand the question you posed to be as follows:

ISSUE

1. Does the State of Hawaii have legal authority
to regulate water pollution from federal facilities, parti-
cularly the discharge of pollutants?

ANSWER

1. Yes.

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STATEMENT OF FACTS

I previously answered this question for you by short memo form dated April 25, 1978. Upon reviewing the letter dated March 30, 1978, from USEPA Region 9 to Dr. Kumagai, I perceived that a more formal communication may be necessary. I further perceived that in addition to answering the above issue you may desire my comments on the EPA's letter to Dr. Kumagai.

The letter concerns the applicability of State laws to federal facilities via the NPDES program, and that program deals solely with point source pollution, i.e., the discharge of pollutants.

Federal Clean Water Act § 313(a), 33 USC § 1323 (also known as the Federal Water Pollution Control Act) already subjects federal facilities to state and local substantive and procedural water pollution control requirements, among other things. Congress specifically amended § 313, effective December 1977, to overturn the Supreme Court's interpretation in E.P.A. v. California, 426 U.S. 200 (1976), that § 313 did not subject federal facilities to state procedural requirements, such as permits. The sole question is thus one of the coverage of state law.

DISCUSSION

H.R.S. § 342-33 (1977 Supp.) states in relevant part:

"Prohibition. No person, including any public body, shall discharge any pollutant into state waters, or cause or allow any pollutant to enter state waters except as in compliance with the provisions of this chapter, rules and regulations promulgated to this chapter, or a permit issued by the director."

H.R.S. § 342-33 thus clearly covers the discharge of pollutants; it covers point source pollution.

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H.R.S. § 342-31(10) (1977 Supp.) defines "pollutant" almost identically to the federal definition of "pollutant" in Clean Water Act, Section 502(6), 33 USC § 1362(6).

H.R.S. § 342-1(6) defines "person" as follows:

"Person" means any individual, partnership, firm, association, public or private corporation, the State or any of its political subdivisions, trust estate or any legal entity."

The Federal government and its agencies are "legal entities" with the H.R.S. § 342-1(6) definition of "person" and are thus subject to the relevant prohibition in H.R.S. § 342-33.

Public Health Regulations (PHR) Chapter 37, Water Pollution Control, § 3, contains a similar prohibition against the discharge of pollutants. That section reads in relevant part:

"No person, including any public body, shall use any state waters for the disposal of waste or the discharge of a pollutant, engage in activity which causes state waters to become polluted, except as in compliance with permit or zone of mixing issued by the Director."

PHR Chapter 37, § 1(e) defines "person" as follows:

"Person" means any individual, firm, association, organization, partnership, business, trust, corporation, company, foundation, or other institution or entity, or governmental agency."

The federal government and its agencies fall within the PHR Chapter 37, § 1(e) definition of person because they are institutions, entities, and government agencies. A General prohibition of PHR Chapter 37, § 3, thus applies to the federal government and its agencies.

Procedural matters under the statutory and regulatory scheme discharge of pollutants are to apply for and receive permits from the Director of Health covering their proposed discharges.

These permits will be referred to as NPDES permits. The statutory and regulatory proceedings governing permits appear at H.R.S. § 342-6 and in PHR Chapter 37, which sets forth the details of the NPDES system in Hawaii.

While the State clearly has authority under State law to regulate discharges from federal facilities, and while the Clean Water Act amendments of 1977 remove any federal bars to state permit requirements of federal facilities, there remain certain procedural matters to be worked out. PHR Chapter 37, § 33 is relevant and reads:

"Adoption of Permits Previously Issued by EPA.

Pursuant to § 402 of the Act, the State of Hawaii was authorized by the Administrator on November 28, 1974, to administer the NPDES Permit Program in the State and to issue permits pursuant to said program. Prior to said authorization, the Administrator had issued sixty (60) NPDES permits to Hawaii dischargers of pollutants other than those permits issued to agencies and instrumentalities of the United States of America (hereinafter in this Regulation the "prior permits"). Public notices satisfying Section 9 of these regulations were recently published on said prior permits. Said prior permits also satisfy Section 15 of these regulations since the State has recently certified each one pursuant to Section 401 of the Act.

"Accordingly, all NPDES permits for discharges into waters of State of Hawaii issued by the Administrator pursuant to the Act (prior permits) and in existence on the effective date of this regulation shall be continued and shall be deemed NPDES permits issued by the Administrator to agencies and instrumentalities of the

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Federal government. The Director shall be substituted in place of the Administrator as those rights and duties specified in the prior permits unless the permits specify that a right or duty is owed to, or exists in favor of both the Director and the Administrator."

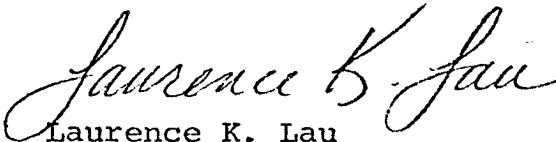
That section indicates that there are at least three classes of permits: Those issued initially by the Department of Health, those issued initially by the EPA and subsequently adopted by the State pursuant to § 33, and those permits issued by EPA to federal facilities and still administered by EPA. Before federal facilities would have valid state permits under state law, the federal facilities involved would either have to:

1. Individually apply for and receive NPDES permits from the State pursuant to H.R.S. § 342-6 and PHR Chapter 37; or

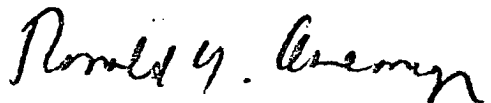
2. The federal facilities' permits would have to be adopted by the State by regulation as was done in PHR Chapter 37, § 33 with regard to permits originally issued by EPA to non-federal facilities.

The latter course of action would require an amendment to PHR § 37. Other procedural considerations concerning amendments of the existing "memorandum of agreement" between the State and the Environmental Protection Agency are noted in the letter from the EPA to Dr. Kumagai dated March 30, 1978.

I suggest that we discuss the procedural matters further.


Laurence K. Lau
Deputy Attorney General

APPROVED:


Ronald Y. Amemiya
Attorney General